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Via Email to SGMPS@water.ca.gov

California Department of Water Resources
Attn: Lauren Bisnett, Draft GSP Emergency Regulations Public Comment
P.O. Box 942836
Sacramento, CA 94236

Re: Draft GSP Emergency Regulations Public Comment

Ms. Bisnett:

These comments are made on behalf of the following entities: Shafter-Wasco Irrigation District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lower Tule Irrigation District, Vandalia Water District, Teapot Dome Irrigation District, Mid-Kaweah GSA, Tule Subbasin GSA and City of Tulare.

These entities are contemplating either serving directly as a Groundwater Sustainability Agency ("GSA"), or joining with other agencies to form a multiple-agency GSA. They therefore have direct and indirect interests in the implementation of the Sustainable Groundwater Management Act ("SGMA" or "Act") and the Draft Groundwater Sustainability Plan Regulations ("Draft Regulations") published by the Department of Water Resources ("Department"). Consistent with those interests, we provide the following comments:

I. Background

A. The Sustainable Groundwater Management Act

The Sustainable Groundwater Management Act was enacted in 2014 with the passage of SB 1168 (Pavley), AB 1739 (Dickinson), and SB 1319 (Pavley). These bills and their accompanying legislative history clearly demonstrate that, in enacting SGMA, the Legislature intended to *empower* local agencies to manage groundwater by providing them with appropriate regulatory tools and authorities.

The impetus for bills that would become SGMA came in January of 2014 when Governor Brown released the California Water Action Plan ("CWAP"), which called on the state to improve sustainable groundwater management:

> Groundwater is a critical buffer to the impacts of prolonged dry periods and climate change on our water system. The administration will work with the Legislature to ensure

> that *local and regional agencies have the incentives, tools, authority and guidance to develop and enforce local and regional management plans* that protect groundwater elevations, quality, and surface water-groundwater interactions.[1]

A few months later, the Governor's Office released a draft framework for soliciting input on actions to advance this goal. The framework emphasized that local agencies are the most familiar with the condition of their groundwater basins and are therefore in the best position to manage those resources.[2]

Building on the work coming out of the Governor's Office, the earliest versions of the bills emphasized the importance of local control.[3] And the same is true of later versions.[4] Assembly and Senate Floor Analyses accompanying SB 1168 explained that the bill would "[e]nact [SGMA] with the stated intent of *empowering local groundwater agencies* to sustainability manage groundwater basins through the development of GSPs."[5] Referring to SB 1168, the bill's author, Senator Pavley, explained:

> [T]his bill is needed because ... [i]n many areas of the state, local groundwater managers *lack the tools and authorities to manage the groundwater basins*... [W]ithout *improved local management* the overdraft in many parts of the state will get even worse over the next several years.[6]

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[1] 2014 California Water Action Plan, at 14.

[2] *See* AB 1739 4/28/14 Assembly Water, Parks, and Wildlife, at 6.

[3] *See* SB 1168 4/21/14 Senate Natural Resources and Water, at 3 ("[T]he intent of the Legislature in enacting this Act would be that ... [a]ll groundwater basins and subbasins be managed sustainably by local entities pursuant to an adopted sustainable groundwater management plan."); AB 1739 5/13/14 Assembly Appropriations, at 2 ("This bill seeks to improve local and regional groundwater management efforts to achieve sustainable groundwater levels, especially in high and medium risk overdraft basins and subbasins.").

[4] *See, e.g.*, AB 1739 9/9/14 Senate Floor Analysis, at 8 (explaining that Brown Administration sought to "work with the Legislature to ensure that local and regional agencies have the incentives, tools, authority and guidance to develop and enforce local and regional management plans that protect groundwater"); AB 1739 8/28/14 Assembly Floor Analysis, at 5 ("[T]his bill and the contingently-enacted SB 1168 seek to empower local governments to manage groundwater sustainably while allowing the state to step in if they fail to do so."); SB 1319 8/29/14 Assembly Floor Analysis, at 2 ("SB 1168 and AB 1739 set out a locally-driven sustainable groundwater management process.")

[5] *See* SB 1168 8/29/14 Assembly Floor Analysis, at 1; SB 1168 8/29/14 Senate Floor Analysis, at 3 (emphasis added).

[6] SB 1168 8/29/14 Senate Floor Analysis, at 6 (emphasis added).

Given this background, it is not surprising that the strongest statements attesting to the importance of local control are found in the final version of the Act. Echoing the CWAP and the Governor's framework, the uncodified findings declare that "[g]roundwater resources are *most effectively managed at the local or regional level*" and that "[l]ocal and regional agencies need to have the necessary *support and authority* to manage groundwater sustainably."[7] Water Code § 113 states that "[s]ustainable groundwater management is *best achieved locally* through the development, implementation, and updating of plans and programs based on the best available science."[8]

As Water Code § 10720.1(h) explains, and the legislative history confirms, the Legislature intended SGMA as a means "to manage groundwater basins through the actions of local government agencies to the *greatest extent feasible*, while minimizing state intervention to *only when necessary* to ensure that local agencies manage groundwater in a sustainable manner."[9]

It is against this background that SGMA must be read.[10]

B. Section 10733.2

Water Code § 10733.2 authorizes the Department to adopt regulations for evaluating groundwater sustainability plans ("GSPs"), GSP implementation, and coordination agreements. It states that "[t]he regulations shall *identify* [1] the necessary plan components specified in Sections 10727.2, 10727.4, and 10727.6 and [2] other information that will assist local agencies in developing and implementing groundwater sustainability plans and coordination agreements." Subdivision (b) states that "[t]he regulations ... shall *identify* appropriate methodologies and assumptions for baseline conditions..."

The Department has no authority to promulgate regulations that exceed the scope of authorization specified in SGMA.[11] Indeed, "[r]egulations that alter or amend the statute or

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[7] Sustainable Groundwater Management Act of 2014, Uncodified Findings.

[8] (emphasis added).

[9] (emphasis added).

[10] *PaintCare v. Mortensen*, 233 Cal. App. 4th 1292, 1306 (2015), review denied (May 13, 2015) ("Where the court interprets different portions of a statute, the court considers the sections 'in the context of the entire statute and the statutory scheme of which it is a part....'").

[11] *See Martinez v. Combs*, 49 Cal. 4th 35, 61, 231 P.3d 259, 276 (2010), *as modified* (June 9, 2010) ("[A]n administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power."); *PaintCare*, 233 Cal. App. 4th at 1305 ("An administrative agency "has only as much rulemaking power as is invested in it by statute."); *Mineral Associations Coal. v. State Mining & Geology Bd.*, 138 Cal. App. 4th 574, 583 (2006) ("An administrative agency has no authority to promulgate a regulation that is inconsistent with controlling law.").

enlarge ... its scope are void."[12] However, § 10733.2 cannot be read to authorize the Department to *require* the laundry list of information currently contemplated by the Draft Regulations. SGMA authorizes the Department only to *identify* various information—i.e., to identify (1) the "necessary plan components" already specified in SGMA, (2) other information that will assist local agencies in developing and implementing their plans, and (3) appropriate methodologies and assumptions for baseline conditions.

SGMA does not authorize the Department to "determine" or "establish" plan components, or to "require" other information if the Department believes it will be useful to the local agency.[13] "The words of [a] statute may not be altered to accomplish a purpose that does not appear on the face of the statute." Had the Legislature intended for the Department to establish additional requirements beyond those specified in SGMA, it could easily have added language to accomplish that result. However, it did not do so. Instead, both subdivisions (a) and (b) consistently use the word "identify" to describe the Department's role in drafting the regulations. Given SGMA's commitment to enhancing local groundwater management, this is not surprising.

Any interpretation of § 10733.2 that would permit the Department to establish additional requirements—beyond those specified in SGMA—would be inconsistent with the provision's unambiguous mandate and the Legislature's stated intent "to manage groundwater basins through ... local government agencies to the *greatest extent feasible*, while minimizing state intervention..."[14] As SGMA recognizes, local entities are in the best position to determine what needs to be done to achieve the sustainability goal in their basin, not the Department.[15] By authorizing the Department to incorporate SGMA's GSP requirements and to identify—but not to require—other information that will be useful, § 10733.2 struck the appropriate balance between state and local control. It recognizes that groundwater is most effectively managed at the local level while also establishing a means by which the Department can support local efforts.[16] This balance must be maintained in the regulations.

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[12] *Mineral Associations*, 138 Cal. App. 4th at 583.

[13] *See Ventura Unified School District. v. Superior Court*, 92 Cal. App. 4th 811, 815 (2001), *as modified* (Oct. 1, 2001).

[14] § 10720.1(h) (emphasis added).

[15] Water Code § 113 ("Sustainable groundwater management is *best achieved locally*...").

[16] *See* Sustainable Groundwater Management Act of 2014, Uncodified Findings.

II. Comments

A. To honor SGMA's intent of enhancing local control over groundwater and to ensure timely and efficient implementation of sustainable groundwater management, the "substantial compliance" standard should be applied to all requirements that exceed SGMA's express mandates.

Section 355.4(a) is inconsistent with other provisions of the Draft Regulations and exceeds the Department's authority. Section 355.4(a) states that "[a]n initial Plan will be deemed inadequate unless it satisfies all of the following conditions: ... (2) The Plan is *complete and includes all information required* by the Act and this Subchapter..." (emphasis added). This statement is inconsistent with other provisions requiring only "substantial compliance."[17] Additionally, because it requires, as a condition to a determination of plan adequacy, "all information" sought under the Draft Regulations, it also exceeds the regulatory authority granted in § 10733.2. Furthermore, by requiring strict compliance with the extensive requirements contained in the Draft Regulations, regardless of whether those requirements are appropriate in light of local conditions, § 355.4 usurps local control and risks delaying the implementation of sustainable groundwater management.

Because this provision exceeds the Department's authority and undermines SGMA's commitment to local control, it should be revised. Section 355.4(a), and any other similar provisions, should therefore be amended to reflect that only substantial compliance is required so long as SGMA is otherwise satisfied. This change would be consistent with § 10733.2 because it would recognize that the only "necessary plan components" are those specified in SGMA.[18] Other information sought by the Draft Regulations is not required; it is merely identified to assist local agencies in developing and implementing their groundwater sustainability plans and coordination agreements.

Suggested Revision: "An initial Plan will be deemed inadequate unless it ~~satisfies~~ is in substantial compliance with the provisions of this Subchapter, including all of the following conditions: ... (2) The Plan is complete and includes all information required by the Act and this Subchapter..."

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[17] *See, e.g.*, § 355.2(e)(1) ("The Department has determined that the Plan satisfies the goals of the Act and is in *substantial compliance* with this Subchapter.") (emphasis added); § 355.4 ("The Department shall evaluate a Plan to determine whether the Plan has the overall effect of achieving the sustainability goal for the basin, complies with the Act, and is in *substantial compliance* with this Subchapter.") (emphasis added); § 350.2 ("The Department shall evaluate the adequacy of all Plans ... based on a *substantial compliance* standard ..., provided that the goals of the Act are satisfied.") (emphasis added).

[18] § 10733.2 ("The regulations shall identify the necessary plan components specified in Sections 10727.2, 10727.4, and 10727.6...")

B. To avoid confusion and to ensure consistency with SGMA's mandate, the definition of "substantial compliance" should be moved to the definitions section.

As explained above, application of the "substantial compliance" standard is necessary for the regulations to be consistent with the authorization contained in Water Code § 10733.2. Although the Draft Regulations do define the "substantial compliance" standard, they do so only in the introductory provision of § 355.4.[19] However, the standard is invoked in other sections as well.[20] Therefore, to avoid confusion as to whether the standard articulated in § 355.4 is controlling, it should be relocated to the definitions section so that it is clear that one standard controls throughout the regulations.

Suggested Revision: Move definition of "substantial compliance" from § 355.4 to § 351.

C. To avoid confusion and imposing an excessive burden on GSAs in large basins, the word "basin" should be defined so as to reflect the meaning attributed in SGMA.

The term "basin" should be defined, and it should be given the same meaning as in SGMA. The term "basin" is obviously of fundamental importance to the regulations. However, not only is the term undefined, but it is inconsistently used throughout the Draft Regulations. By using the phrase "entire basin" in some provisions—apparently to refer to the whole basin, as opposed to particular subbasins—and simply the word "basin" in others, the Draft Regulations create needless confusion as to how the term is to be interpreted.[21]

In several areas of the state, larger "basins" are divided into "subbasins". For instance, Bulletin 118 divides the San Joaquin Valley Basin into seven distinct subbasins. Thus, SGMA defines "basin" to mean "a groundwater basin *or* subbasin identified and defined in Bulletin 118…") (emphasis added). Accordingly, when the term "basin" is used in SGMA and applied to the San Joaquin Valley Basin, it is understood to refer only to the individual subbasins and not to the whole San Joaquin Valley Basin.

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[19] *See* § 355.4 ("Substantial compliance means that the Agency has attempted to comply with these regulations in good faith, that the supporting information is sufficiently detailed and the analyses sufficiently thorough and reasonable, in the judgment of the Department, to permit evaluation of the Plan, and the Department determines that any discrepancy would not materially affect the ability of the Agency to achieve the sustainability goal or of the Department to evaluate the likelihood of the Plan to attain that goal.").

[20] *See* §§ 355.2, 357.4.

[21] *See, e.g.*, § 354.8(a)(5) (requiring maps depicting "the density of wells ... in the basin, including de minimis extractors"); § 355.4(a)(3) ("An initial Plan will be deemed inadequate unless ... [t]he Plan covers the *entire* basin.") (emphasis added).

Whatever the Department's intent in employing the phrase "entire basin" in some provisions and the unqualified "basin" in others, SGMA defines the word "basin" and that definition should be expressly incorporated into the Draft Regulations. The Draft Regulations should therefore be revised to avoid any confusion as to whether the term "basin" refers to a subbasin or to the entire basin.

Suggested Revision: Define "basin" in § 351 to have the same meaning as in SGMA.

D. To empower local groundwater management and to avoid unnecessary state intervention, the Draft Regulations should not implicitly require specific management actions.

Some of the requirements for minimum thresholds appear to implicitly require specific management actions that, depending on local conditions, may not be necessary or appropriate. For instance, § 354.28(b)(1)(C), states that "[m]inimum thresholds for chronic lowering of groundwater levels *shall* be supported by ... *management of extractions and recharge* to ensure that chronic lowering of groundwater levels or depletion of supply during periods of drought is offset by increases in groundwater levels or storage during other periods."[22]

This appears to require agencies both to manage extractions and to manage recharge. However, depending on local conditions, there may be instances where management of recharge alone is sufficient for the sustainability goal. Under such circumstances, requiring agencies also to manage extractions would be unnecessary and would needlessly undermine the goal of local groundwater management. Therefore, this language should be revised so as not to preclude a local determination of which management actions to implement.

Suggested Revision: Amend § 354.28 as follows: "Minimum thresholds for chronic lowering of groundwater levels *shall* be supported by ... management ~~of extractions and recharge~~ actions to ensure that chronic lowering of groundwater levels or depletion of supply during periods of drought is offset by increases in groundwater levels or storage during other periods."

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[22] (emphasis added).

E. To prevent needless delay of investment in and implementation of GSPs, the Department should issue a preliminary determination of adequacy within six months of a GSP's submittal date.

At present the Draft Regulations do not require any preliminary assessment that can be relied upon by the submitting agency during the lengthy, two-year assessment period.[23] However, absent some preliminary indication as to whether the plan is likely to be deemed adequate, conditionally adequate, or inadequate, agencies may be reluctant to commence plan implementation. Without any preliminary indication of the Department's assessment, agencies would risk investing in plan components that may ultimately be removed from the final, approved plan. On the other hand, if armed with a preliminary assessment of adequacy, agencies would be in a position to scale back actions the Department has flagged as potentially problematic, and to focus their limited resources on actions likely to be approved.

Suggested Revision: Add the following provision to § 355.2: "The Department shall issue a preliminary evaluation of a Plan within six months of its submittal date. The preliminary evaluation shall be in writing and shall identify any aspects of the Plan which, upon further evaluation and assessment, may give rise to a determination of inadequacy or conditional-adequacy. The preliminary evaluation may include recommended corrective actions to address potential deficiencies identified in the preliminary assessment. The preliminary evaluation is solely for informational purposes and does not in any way bind the Department to a determination of adequacy, conditional-adequacy, or inadequacy after it has conducted a full evaluation."

F. To ensure local control and to avoid creating a hierarchy among GSAs, provisions requiring the designation of "coordinating agencies" and "submitting agencies" should be removed.

The Draft Regulations require agencies participating in a coordination agreement to designate a "sole" point of contact for all communications with the Department. However, this effectively creates a hierarchy of GSAs, which undermines local authority and prevents agencies from working with the Department to receive technical assistance as contemplated in SGMA.

Section 357.4(b) states that intrabasin coordination agreements "shall establish or identify a Submitting Agency that shall be *the single point of contact with the Department.*"[24] Section 355.10(a) states that "[d]isputes within a basin shall be the responsibility of the Coordinating Agency or other entities responsible for managing Plans and alternatives within that basin." Section 351(i) defines "coordinating agency" as referring to "a groundwater sustainability agency or other authorized entity that represents two or more Agencies or Plans for a basin and *is the sole point of contact with the Department.*"[25]

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[23] *See* § 355.2.

[24] (emphasis added).

[25] (emphasis added).

The Draft Regulations' requirement of establishing a "single point of contact with the Department" contradicts SGMA's instructions. Water Code § 10733.4 provides that "[w]hen the entire basin is covered by groundwater sustainability plans, the groundwater sustainability *agencies shall jointly submit* to the department all of the following..."[26] This language plainly contemplates a submission, not by a single point of contact, but by all of the submitting agencies acting collectively. Furthermore, requiring a "single point of contact," while perhaps convenient from the Department's perspective, would effectively preclude contact from other entities. This is inconsistent with SGMA's purpose of providing "[l]ocal and regional agencies [with] the necessary support ... to manage groundwater sustainably."[27] Furthermore, the Draft Regulations appear to place the submitting agency in a position of authority as to other agencies party to a coordination agreement.[28] They also inappropriately assign adjudicative responsibilities to a body that may be ill-equipped to handle them. Accordingly, these provisions should be removed.

Suggested Revision: Delete §§ 351(i), 355.10(a), and 357.4(b).

G. To avoid abdicating its responsibilities and to ensure local agencies can confidently invest resources into approved Plan components, the Department should not reserve the right to evaluate a GSP "at any time."

Permitting the Department to declare a GSP inadequate "at any time"—without any qualification tied to achieving sustainability, such as materially changed circumstances, repeated failure to operate within established minimum thresholds, or the results of periodic review—abdicates the Department's responsibility to satisfactorily assess GSPs at the required times and undermines a GSAs ability to rely on the Department's initial assessment in implementing an approved GSP.

Section 350.2(g) states that "[t]he Department may evaluate a Plan at *any* time, for compliance with the Act and this Subchapter." To the extent that the Department may rely on this provision to deem inadequate a GSP that was previously deemed adequate pursuant to Article 6 of the Draft Regulations, it is problematic. Given the significant investment of time and money to develop and implement an approved GSP, GSAs are entitled to some degree of certainty that their investment will not be compromised "at any time." Furthermore, it is incumbent upon the Department to perform a satisfactory assessment of GSPs during the two-year period it has to

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[26] (emphasis added).

[27] Sustainable Groundwater Management Act of 2014, Uncodified Findings.

[28] *See, e.g.*, § 357.4(d) ("The Submitting Agency shall compile and *rectify data and interpretations regarding basin conditions* provided by the Agencies and produce a single report synthesizing and summarizing that information into a coherent and credible account of basin conditions.") (emphasis added); § 355.10(a) ("Disputes within a basin shall be the responsibility of the Coordinating Agency...").

assess the adequacy of GSPs submitted for approval. Section 350.2(g) should therefore be revised so that the Department is permitted to re-evaluate a plan that was previously deemed adequate only if there is evidence to suggest that the Plan is no longer adequate.

Suggested Revision: Amend § 350.2(g) as follows: "The Department may evaluate a Plan at any time, for compliance with the Act and this Subchapter~~.~~; provided that, if the Department has already deemed a Plan adequate, the Department will not re-evaluate the Plan unless required by law to do so or changed circumstances indicate a substantial likelihood that the Plan is no longer adequate within the meaning of this Subchapter."

H. To improve local control over groundwater management, the Department should clarify that, for purposes of establishing management areas, agencies are responsible for determining whether critical parameters "differ significantly" from those of the basin at large.

As with other factual determinations dependent on local conditions, determinations regarding whether critical parameters "differ significantly" from those of the basin at large should be expressly reserved to local agencies. Section 354.20 permits GSAs to "define one or more management areas within a basin if [1] local conditions for one or more critical parameters differ significantly from those of the basin at large, and [2] if the Agency has determined that subdivision into management areas will facilitate implementation of the Plan." Establishing management areas allows an agency to establish different minimum thresholds and to operate to different measureable objectives than the basin at large.

Allowing agencies to establish management areas is a good idea, as it will preserve local control and promote efficiency consistent with the principles articulated in SGMA. However, the language should be revised to reflect that both determinations are to be made by the agency, not just the second one. As with the establishment of minimum thresholds defining when critical parameters become "significant and unreasonable,"[29] it is best to allow local entities define vague factual standards, as they are in the best position to assess local conditions. The second prong of this test appears to recognize this fact, as it leaves the determination of whether management areas will "facilitate" Plan implementation to the agency. However, the first prong does not specify who is responsible for determining whether local conditions for a critical parameter "differ significantly" from those of the basin at large. The provision should therefore be revised to make it clear that the *agency* is responsible for making the determination in both instances.

Suggested Revision: Amend § 354.20 as follows: "Each Agency may define one or more management areas within a basin if the Agency has determined that local conditions for one or

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[29] *See* § 354.26 ("Each Agency shall describe the process and criteria relied upon to define undesirable results applicable to the basin. Undesirable results occur when significant and unreasonable effects for any of the critical parameters are caused by groundwater conditions occurring throughout the basin.").

more critical parameters differ significantly from those of the basin at large, and if the Agency has determined that subdivision into management areas will facilitate implementation of the Plan."

I. To avoid imposing an excessive burden on local agencies, the scope of a GSA's obligations with respect to groundwater well mapping should be clarified

Section 354.8(a)(5) requires GSPs to include one or more maps of the basin that depict "the density of wells per square mile, by dasymetric or similar mapping techniques, showing the distribution of all agricultural, industrial, and domestic water supply wells in the basin, including de minimis extractors, and the location and extent of communities dependent upon groundwater. Each Agency shall utilize data available from the Department, as specified in Section 353.2, or the best available information."[30]

The Draft Regulations need to clarify the scope of the Agency's obligations under this provision. The provision states that agencies "shall utilize data available from the Department ... or the best available information." On the one hand, this suggests that the Department will be providing the information. However, the provision leaves open the possibility that the Department does not provide any information and, in that case, the agency would be required to compile the "best available information." Requiring an agency to include in its GSP a map depicting all wells in the basin, including de minimis extractors would be an excessive burden to impose, particularly on small, regional agencies in large basins. It would also needlessly duplicate work. Every agency would be required to develop a map for the whole basin, even if the area is managed by multiple GSPs subject to a coordination agreement. Further, it is not clear why an agency managing one area of a subbasin, or even an entire subbasin, would need to generate maps of wells in other subbasins; only those wells operating within an agency's jurisdictional reach are relevant to its groundwater management. To the extent that wells operating in other basins may impact sustainability in neighboring areas, agencies entering into coordination agreements can share the maps they have generated of their respective management areas.

In light of the above, it would be far more efficient to request agencies to map the wells in their jurisdictional area *only*, submit that information to the Department, and then, if necessary, have the Department compile that information into a unified map.

Suggested Revision: Amend § 354.8 as follows: "Each Plan shall include a description of the geographic areas covered, including ... [o]ne or more maps of the basin that depict ... [t]he density of wells per square mile, by dasymetric or similar mapping techniques, showing the distribution of all agricultural, industrial, and domestic water supply wells in the ~~basin~~ Agency's management area, including de minimis extractors, and the location and extent of communities dependent upon groundwater. Each Agency shall utilize data available from the Department, as specified in Section 353.2, or the best available information."

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[30] Section 353.2(b) states that "[i]nformation provided by the Department pursuant to this Subchapter shall be provided on its Internet Web site."

J. To avoid imposing an excessive burden on local agencies, the "clear and convincing evidence" standard should be removed.

Agencies should not be subject to the clear and convincing evidence standard when showing that representative minimum thresholds are appropriate or that minimum thresholds are not required for certain critical parameters. Section 354.28(d) permits an agency to establish "representative minimum threshold for groundwater elevation to serve as the minimum threshold value for multiple critical parameters." Section 354.28(e) states that agencies may "determine[] that minimum thresholds are not required for seawater intrusion, land subsidence, depletions of interconnected surface water, or water quality." However, in both cases the Draft Regulations require the agency's determination to be supported by "clear and convincing evidence." The clear and convincing evidence standard requires a finding of "high probability."[31]

Requiring a finding of "high probability" to support the use of representative minimum thresholds or to forego the establishment of minimum thresholds for certain parameters is not appropriate. An agency may need to use groundwater elevation as a proxy for other critical parameters for many reasons. For instance, if data regarding certain critical parameters is scarce, unobtainable, or excessively difficult to acquire, then using groundwater elevation as a proxy would be the agency's only practical alternative. Under those circumstances, however, given the lack of available data, it would be difficult for the agency to demonstrate to a "high probability" that the "representative minimum threshold is a reasonable and effective surrogate for multiple individual minimum thresholds."

Suggested Revision: Remove references to "clear and convincing evidence" in §§ 354.28(d) and 354.28(e).

Sincerely,

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Nicolas R. Cardella

NRC/va

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[31] *In re Angelia P.*, 28 Cal. 3d 908, 919 (1981) ("'Clear and convincing' evidence requires a finding of high probability.").